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No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE FOURTEENTH AMENDMENT ANALYSIS FOR PRETRIAL DETAINEES IS DIFFERENT FROM THE ANALYSIS APPLIED TO CONVICTED PRISONERS. 1

A. The Fact of Incarceration is Not a "Game-Changer" That Alters the Analysis for Pretrial Detainees' Due Process Claims..... 1

B. This Court's Decision in *Bell* Does Not Require a Plaintiff to Show Any Subjective Mental State. 10

C. Dicta in a Second Circuit Opinion Predating *Bell* Does Not Warrant a Subjective Intent Requirement. 12

II. THE FOURTH AMENDMENT APPLIES TO MR. KINGSLEY'S EXCESSIVE FORCE CLAIM. 14

III. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY..... 17

IV. THE JURY INSTRUCTIONS IMPROPERLY REQUIRED MR. KINGSLEY TO PROVE THE OFFICERS' SUBJECTIVE INTENT. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. *Creighton*, 483 U.S. 635 (1987) 18
Bell v. *Wolfish*, 441 U.S. 520 (1979) ..... passim
Block v. *Rutherford*, 468 U.S. 576 (1984) 4, 11
Camreta v. *Greene*, 131 S. Ct. 2020 (2011) .. 17
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 8, 9
Farmer v. *Brennan*, 511 U.S. 825 (1994) 21
Francis v. *Franklin*, 471 U.S. 307 (1985) 21
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 9
Graham v. *Connor*, 490 U.S. 386 (1989) 7, 9, 13, 18
Gulliford v. *Pierce Cnty.*, 136 F.3d 1345 (9th Cir. 1998) 18
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 10, 17
Hudson v. *McMillian*, 503 U.S. 1 (1992) 5
Hudson v. *Palmer*, 468 U.S. 517 (1984) 15
Huff v. *Sheahan*, 493 F.3d 893 (7th Cir. 2007) 21
Ingraham v. *Wright*, 430 U.S. 651 (1977) 3, 4, 17
Jennings v. *Stephens*, 135 S. Ct. 793 (2015) 17
Johnson v. *Glick*, 481 F.2d 1028 (2d Cir. 1973) 12, 13
Jones v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) 2
Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 14
Lewis v. *Downey*, 581 F.3d 467 (7th Cir. 2009) 19

TABLE OF AUTHORITIES—continued

Page(s)

Maryland v. *Shatzer*, 130 S. Ct. 1213 (2010) 16
O'Lone v. *Estate of Shabazz*, 482 U.S. 342 (1987) 2
Pearson v. *Callahan*, 129 S. Ct. 808 (2009) 19
Pell v. *Procunier*, 417 U.S. 817 (1974) 2, 7
Peterson v. *Wilson*, 141 F.3d 573 (5th Cir. 1998) 17
Pierce v. *Multnomah Cnty.*, 76 F.3d 1032 (9th Cir. 1996) 9
Plumhoff v. *Rickard*, 134 S. Ct. 2012 (2014) 8
Rhodes v. *Chapman*, 452 U.S. 337 (1981) ... 2, 3
Sandin v. *Conner*, 515 U.S. 472 (1995) 2, 16
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 21
Scott v. *Harris*, 550 U.S. 372 (2007) 8, 10
Tennessee v. *Garner*, 471 U.S. 1 (1985) 16
Titran v. *Ackman*, 893 F.2d 145 (7th Cir. 1990) 19
United States v. *Salerno*, 481 U.S. 739 (1987) 3
Whitley v. *Albers*, 475 U.S. 312 (1986) 5, 7, 13, 14
Wilson v. *Seiter*, 501 U.S. 294 (1991) 6, 7
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 14

STATUTES

28 U.S.C. § 1915 10
42 U.S.C. § 1997e 10

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 201932, *Profile of Jail Inmates, 2002* (rev. 2004), *available at* http://www.bjs.gov/content/pub/pdf/pji02.pdf 6

Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153 (2015) 10

REPLY BRIEF

I. THE FOURTEENTH AMENDMENT ANALYSIS FOR PRETRIAL DETAINEES IS DIFFERENT FROM THE ANALYSIS APPLIED TO CONVICTED PRISONERS.

Ignoring this Court's clearly articulated differences between the liberty interests held by pretrial detainees and convicted prisoners, as well as the permissible governmental interests that apply to each, respondents insist that "the fact of incarceration" should lead to a single legal standard for all incarcerated persons' claims. The principle underlying respondents' test is a near-absolute deference to correctional officers that would insulate them from accountability beyond established constitutional standards. Respondents' test does not comport with *Bell* v. *Wolfish*, 441 U.S. 520 (1979), or this Court's other related precedent of the last forty years.

A. The Fact of Incarceration is Not a "Game-Changer" That Alters the Analysis for Pretrial Detainees' Due Process Claims.

Respondents insist repeatedly that subjective intent is a requirement for pretrial detainees' excessive force claims because "the fact of incarceration fundamentally affects the constitutional rights of incarcerated individuals." Br. Resp'ts 18. As a corollary to this blanket assertion, they characterize this Court's cases as driven primarily by a "need" to defer to corrections officers. Br. Resp'ts 23. Neither claim is correct.

1. The "fact of incarceration" is not a "game-changer." Br. Resp'ts 20. Respondents reach this conclusion by improperly collapsing this Court's ju-

risprudence on two important dimensions. First, they ignore the profoundly different governmental interests that States possess in dealing with pretrial detainees and convicted prisoners. Although the government surely has legitimate interests regarding a pretrial detainee, they all stem from its threshold interest in "detain[ing] him to ensure his presence at trial." *Bell*, 441 U.S. at 536; see also *id.* at 539–40. A State, however, may pursue a broader range of interests with convicted prisoners—most notably its "legitimate penological objectives," which include deterrence and rehabilitation. *Pell* v. *Procunier*, 417 U.S. 817, 822–23 (1974); see also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987). As respondents' authorities describe, this battery of policies and goals applies only after a conviction obtained "in accordance with due process of law." *Pell*, 417 U.S. at 822; see also *Jones* v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). Within the Eighth Amendment's limits, the government may thus impose "restrictive and even harsh" conditions simply as "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). Respondents, however, seek to erase the distinction between these sets of governmental interests and "improperly extend the legitimate reasons for which [pretrial detainees] are detained—to ensure their presence at trial." *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995).[1]

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[1] These governmental interests may influence the *application* of the relevant constitutional tests, but never alter their substance. Courts ably account for the kinds of governmental interests that are not present when police encounter a suspect on the street, such as the need to maintain order or the risk of escape. Thus, *Bell*'s rejection of certain "constitutional claims of pretrial detainees that surely would have succeeded" if brought by free citizens, Br. Resp'ts 22, is simply a product of the differ-

Second, even when the governmental interests concerning pretrial detainees and convicted prisoners align significantly, prison officials must respect the categorical difference between the due process rights of detainees and the Eighth Amendment rights of convicted prisoners. Although respondents argue that a person's pre-or-post-conviction status is "far less relevant" than the simple fact of incarceration, Br. Resp'ts 20, this Court has recognized that pretrial detainees retain *greater* rights than their convicted counterparts because they have not yet received the process they are due prior to a deprivation of liberty. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) (noting that detainees are protected from "impermissible punishment before trial"); *Bell*, 441 U.S. at 535–36; cf. *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977) (finding Eighth Amendment inapplicable to public school students' claims regarding corporal punishment and applying Fourteenth Amendment). The Court has most clearly drawn this distinction in the conditions of confinement context: convicted prisoners must demonstrate "deliberate indifference" to "basic human needs" to prevail under the Eighth Amendment, *Rhodes*, 452 U.S. at 347, but a pretrial detainee's due process claim turns on the less demanding *Bell* standard. 441 U.S. at 537–39. The differing liberty interests of the persons involved justify the "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id.* at 537.

Respondents also ignore the distinct constitutional texts that provide the foundation for these varying standards. Under the Eighth Amendment, convicted

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ent government interests in play, rather than any additional substantive showing that detainees must make.

prisoners may be subjected to punishment, but not punishment that is cruel and unusual; by expressly identifying a mental state, that clause forbids only the "'unnecessary and wanton infliction of pain.'" *Ingraham*, 430 U.S. at 670 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976)). But the Due Process Clause's guarantee that no State shall "deprive any person of life, liberty, or property, without due process of law" contains no mental state, and this Court has distinguished the rights of pretrial detainees from those of convicted prisoners by negative implication: pretrial detainees are protected against *any* official conduct that is "not reasonably related to a legitimate goal." *Bell*, 441 U.S. at 539; see also *Block* v. *Rutherford*, 468 U.S. 576, 583–84 (1984). In short, this Court has concluded that an individual's status matters, both because of the greater liberty interests of pretrial detainees and the limited governmental interests that apply to their detention.

By eliminating carefully-drawn distinctions between the applicable governmental interests and liberty interests, respondents propose a freewheeling standard that would usurp the role of district judges and juries, driven mainly by jailers' own preferences. Respondents baldly suggest that guards' "training," and not established legal standards, should be the measure of detainees' due process rights. Br. Resp'ts 40. They repeatedly urge that deference to jailers' decisions is essential even when a factfinder would conclude that no objective evidence could justify those decisions. See, *e.g.*, Br. Resp'ts 23. And by warning of "a relative flood of claims" by "incarcerated individuals," Br. Resp'ts 38, who "have ample time to contemplate potential litigation against" prison officials,

Br. Resp'ts 21,[2] they impugn the ability of district courts to sort frivolous excessive-force claims from sound ones. *E.g.*, Br. Resp'ts 39. In the end, respondents' broad and selective statements mischaracterize this Court's precedents: none of the cases they cite stands for the proposition that the rights under the Fourteenth Amendment simply collapse into the Eighth, or that governmental interests pertaining to convicted prisoners apply equally to every person who enters a correctional facility.

Stripped of these improper generalizations, respondents' argument that the Eighth Amendment standard of *Whitley* v. *Albers*, 475 U.S. 312 (1986), and *Hudson* v. *McMillian*, 503 U.S. 1 (1992), should be extended to pretrial detainees' due process claims falls flat. See Br. Resp'ts 26–27. *Whitley* and *McMillian* dealt exclusively with convicted prisoners' excessive force claims, and both decisions turned on this Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause. *Whitley*, 475 U.S. at 319 (holding that that Clause proscribes "obduracy and wantonness, not inadvertence or error in good faith"); see also *McMillian*, 503 U.S. at 6. But the Due Process Clause and this Court's cases interpreting it do not turn on the government actor's good faith. Pretrial detainees have a liberty interest in treatment "reasonably related to a legitimate governmental objective" other than punishment, regardless of the official's mental state, because detainees have not yet received the process due before they may be subjected to punitive conditions. *Bell*, 441 U.S. at 539. Thus, if a finder of fact concludes that a use of

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[2] Of course, because many pretrial detainees are never convicted of the charged crime, some excessive-force plaintiffs are not incarcerated at the time they bring suit and have resumed their normal lives.

force against a detainee is objectively unreasonable in relation to the government's security interest, no further showing is required.

2. Respondents also advance a remarkable proposition: that deference to jail officials trumps any textual or historic distinctions among the constitutional provisions that arise in cases brought by pretrial detainees and convicted prisoners. Br. Resp'ts 23; see also Br. Resp'ts 20, 24, 48. Respondents' deference mantra goes too far, asking this Court for something it has expressly sought to avoid: excessive judicial involvement in "policies and predilections" that are divorced from the governing constitutional provisions. *Wilson* v. *Seiter*, 501 U.S. 294, 300 (1991). Respondents invoke deference to bless all manner of policies that they deem desirable, but that are not tethered at all to the constitutional text. See Br. Resp'ts 37–38 (likening the deference rule to the PLRA as a mechanism for making "it more difficult for suits by prisoners to be brought" and as a means for avoiding "flood[s] of claims"); Br. Resp'ts 49 (stating that a non-deferential test will lead to more litigation). In truth, though deference plays a role in determining the standard of review or scrutiny given to certain types of constitutional claims, it does not do the work that respondents assign to it.[3]

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[3] In addition to overstating the need for deference, respondents overstate the dangerousness of pretrial detainees. The same report referenced by respondents shows that 42.5% of pretrial detainees have no previous sentence, compared to 35.3% of convicted prisoners. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 201932, *Profile of Jail Inmates, 2002* 7, Table 9 (rev. 2004), *available at* http://www.bjs.gov/content/pub/pdf/pji02.pdf. Respondent reported that 57.6% of pretrial detainees are recidivists, but this figure includes the 26.9% that are nonviolent. *Id.* Neither dangerousness nor recidivism is dispositive of bail inquiries, but poverty is. Br. ACLU 5.

First, that deference merely provides a softer lens for examining claims that arise in the jail or prison settings; it does not alter the fundamental right at issue, which is determined by reference to the constitutional provision involved and the historical underpinnings of the right. *Wilson*, 501 U.S. at 300. Second, that deference is not absolute. Deference is not warranted, for example, if a plaintiff adduces substantial evidence that the officials have exaggerated their response to institutional security needs, *Pell*, 417 U.S. at 827—as in a case like this one in which five officers and a taser are employed to remove an isolated detainee's handcuffs. Thus the degree of deference is informed by the constitutional right at stake, and not vice-versa. For pretrial detainees, then, any "restrictions and limitations" on their rights must be justified by "the legitimate goals and policies of the penal institution," *Bell*, 441 U.S. at 545–46, not simply by the subjective whims of jailers. Even for convicted prisoners, deference to prison officials does not distort the substantive standard: it "does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley*, 475 U.S. at 322.

In any event, deference to corrections officers is baked into the objective standard that is properly available to detainees. The objective test turns on the "facts and circumstances of each particular case," which include the fact that a use of force occurs in a correctional institution and that a detainee may pose "an immediate threat to the safety of the officers or others." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Jurors are capable of factoring the special expertise of law enforcement officers into an objective analysis; indeed, an arrestee's excessive force claim already requires just that. *Id.* at 396–97 (requiring the

factfinder in an arrestee case to apply "the perspective of a reasonable officer on the scene" instead of 20/20 hindsight, accounting for police officers' "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances). Deference thus coexists with the objective reasonableness inquiry mandated by *Graham*, even in factual situations unfamiliar to most jurors and judges. See *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2021–22 (2014) (applying objective test to police officers' use of force in high-speed chase); *Scott* v. *Harris*, 550 U.S. 372, 383–84 (2007) (same). Factfinders are capable of applying the same test to detainees' claims, and thus the deference owed to jailers does not support any requirement of a subjective showing.

Respondents claim support from *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), but their reading is exactly backwards. Br. Resp'ts 30–31, 52. *Lewis* established only that unintentional conduct does not amount to a due process violation. There, the police officer in a high-speed chase was not operating his car with an "intent to harm suspects physically." *Lewis*, 523 U.S. at 854. In contrast, respondents cannot deny that they acted deliberately in using the taser, an instrument designed for the purpose of inflicting pain. Given this deliberate conduct that the officers knew would inflict pain, *Lewis*'s distinction between "deliberate indifference" and "conduct intended to injure," *id.* at 849, does not apply in this case, see Br. Pet'r 21 n.6—and respondents' fallback suggestion of a "deliberate indifference" test therefore makes no sense. Br. Resp'ts 34–37. Finally, contrary to respondents' suggestion, Br. Resp'ts 30–31, *Lewis* did not import *Whitley*'s subjective element as a requirement in all due process cases; it merely recognized that in some settings, "deliberate indifference

does not suffice." 523 U.S. at 852; see also *id.* at 857 (Kennedy, J., concurring) (noting the relevant due process inquiry is whether the "objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning").

Taken to its logical end, respondents' argument proves too much. If, as respondents suggest, the Fourth Amendment applies only to free persons and "the fact of incarceration" is determinative of everyone else's constitutional rights, anyone who is introduced into a jail may be subjected to a beating, so long as it was not sadistically and maliciously applied. Cf. *Graham*, 490 U.S. at 395 (analyzing excessive force claims of "free citizen[s]" under the Fourth Amendment reasonableness standard); see also, *e.g.*, *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996) (applying Fourth Amendment to excessive force claim of pre-*Gerstein* arrestee subjected to beating in jail cell); Br. Pet'r 30–31 n.10. Respondents' harsh standard would even apply to individuals who have not yet had their *Gerstein* hearings and prior to the government having demonstrated any authority to detain them. *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).

Respondents additionally argue that this Court should treat pretrial detainees and convicted prisoners alike because Congress did so in the PLRA. Br. Resp'ts 21–22. But respondents recognize that the PLRA was not meant to define the scope of pretrial detainees' constitutional rights, but rather "to deter frivolous litigation against prison officials." *Id.* The PLRA, however, does assist in answering a different question: respondents' unfounded fears of a "flood of claims" from pretrial detainees under any standard short of the Eighth Amendment's. Br. Resp'ts 38.

The PLRA's prophylactic measures—its exhaustion and physical injury requirements, three-strikes rule, and limitations on filing and attorney's fees—have been extremely successful in reducing the volume of federal inmate litigation. 28 U.S.C. § 1915(b)-(g); 42 U.S.C. § 1997e(a)-(e); see also Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 160 (2015) (comparing the pre-PLRA filing rate of 24.6 claims per 1000 prisoners in 1995 to 10.2 in 2012). Any frivolous claim that slips past the PLRA's battlements would be put to rest by the protections of qualified immunity or the use of video recording technology, like the one used in the Monroe County Jail, that can help a judge swiftly dispose of a meritless case. See *Scott*, 550 U.S. at 380. Indeed, claims turning on objective standards are generally much more amenable to summary judgment than those containing subjective intent elements. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). There is no need to provide officers additional protection by distorting substantive legal standards.

B. This Court's Decision in *Bell* Does Not Require a Plaintiff to Show Any Subjective Mental State.

Respondents' argument also cannot be squared with *Bell*. *Bell* articulated a test, framed disjunctively, that provides alternative methods for pretrial detainees to prove a subjective due process deprivation: an expressed intent to punish; *or* an act not related to a legitimate government objective; *or* conduct excessive in relation to a legitimate purpose. Br. Pet'r 19–20; see also Br. U.S. 17. And the latter two methods are defined not by reference to punishment and intent, but rather by the action's purpose. Thus *Bell* stands for the proposition that a pretrial detainee

may prevail with objective evidence—by showing that the use of force is not "rationally [] connected" to a legitimate government purpose, or that the force was "excessive in relation to" its stated purpose. *Bell*, 441 U.S. at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). As for the other method, although a pretrial detainee could instead show a due process deprivation with proof of "an expressed intent to punish," *id.* at 520, he is not required to do so in order to prevail.

Respondents zero in on the "expressed intent to punish" alone, arguing that the other two methods are mere proxies for the ultimate issue of jailers' subjective intent. Br. Resp'ts 25. Their position, however, simply does not square with *Bell*'s language, which speaks in terms of purpose and endorses objective showings. The two objective methods are *alternatives* and thus do not require any showing of an official's subjective intent. The Court in *Bell* applied its test in just this way: first noting that the challenged restrictions were concededly not employed "with an intent to punish," the Court then analyzed the claim under the objective methods. 441 U.S. at 561 ("Therefore, the determination whether these restrictions and practices constitute *punishment in the constitutional sense* depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." (emphasis added)); see also *Rutherford*, 468 U.S. at 584 (*Bell*'s objective analysis applies "[a]bsent *proof* of intent to punish" (emphasis added)). As the Solicitor General explains, Br. U.S. 15, these textual clues from *Bell* show that "punishment in the constitutional sense" under the Fourteenth Amendment is wholly separate from subjective intent.

For this reason, *Bell*'s use of the term "punishment" to describe due process violations does not undermine the objective nature of this showing. Many government goals, such as retribution and rehabilitation, are legitimate with respect to treatment of convicted prisoners, but not as to pretrial detainees. A guard's action that is reasonably related only to retribution (and not to legitimate pretrial interests such as detention for trial), for example, may amount to "punishment" of a detainee regardless of the official's state of mind. A good example is the one this Court provided in *Bell*: "loading a detainee with chains and shackles and throwing him in a dungeon" is reasonably related only to retributive purposes, *Bell*, 441 U.S. at 539 n.20, so it can be described as "punishment" without any inquiry into the officer's mental state. Respondents' claim that the term "punishment" necessarily requires a subjective element is therefore incorrect.

C. Dicta in a Second Circuit Opinion Predating *Bell* Does Not Warrant a Subjective Intent Requirement.

Respondents rely on *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973), to support their argument that pretrial detainees and convicted prisoners are subject to the same test, but they ignore that this Court has never in the past forty years embraced that reading of *Johnson*. To the contrary, this Court has explicitly recognized the differences between these two categories of incarcerated individuals: "under the Due Process Clause, a detainee may not be punished" because a detainee, unlike a convicted prisoner, "has not been adjudged guilty of any crime." *Bell*, 441 U.S. 535–36; see *id.* at 537 ("This Court has recognized a distinction between punitive measures that may not consti-

tutionally be imposed prior to a determination of guilt and regulatory restraints that may.").

Indeed, respondents ignore the fact that *Johnson* was decided without the benefit of *Bell* and all this Court's intervening discussions of correctional facilities, excessive force claims, and due process rights.[4] Although Judge Friendly's opinion—written in the nascent stages of § 1983 litigation—was influential in establishing that § 1983 permits excessive force claims at all, this Court's jurisprudence has not stood still since then, and *Johnson*'s dicta has not kept pace with those developments. This Court in *Graham* warned against applying *Johnson* "indiscriminately" and unmoored from "any particular constitutional provision," and sharply rejected the conclusion respondents draw from *Johnson*: the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard." *Graham*, 490 U.S. at 393.

This Court in *Whitley* extracted the "malicious and sadistic" factor from the *Johnson* test in defining the type of "'unnecessary and wanton infliction of pain'" that "'constitutes cruel and unusual punishment forbidden by the Eighth Amendment,'" but that interpretation has no implications for a pretrial detainee's due process rights. 475 U.S. at 319 (quoting *Ingraham*, 430 U.S. at 670). Indeed, were respondents' reading of *Whitley* correct, this Court surely would have applied *Johnson*'s language to the due process claim in that case as well as the Eighth Amendment

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[4] Moreover, even on its own terms, *Johnson* had no occasion to address whether a subjective showing is required. Because the opinion reversed the dismissal of a complaint that described an unprovoked assault and presented ample allegations of bad faith, 418 F.2d at 1029-30, *Johnson* did not consider whether a purely objective showing could suffice to prove liability.

claim. *Whitley*, 475 U.S. at 326–28. It did not. Instead, this Court simply stated that the Eighth Amendment is "the primary source of substantive protection to convicted prisoners" in excessive force cases, and expressly limited its holding to "prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty." *Id.* at 327.

II. THE FOURTH AMENDMENT APPLIES TO MR. KINGSLEY'S EXCESSIVE FORCE CLAIM.

Respondents make two principal arguments in response to Mr. Kingsley's Fourth Amendment claim: first, that the claim is forfeited; and second, that the use of objectively unreasonable force against a pretrial detainee is not a new seizure in light of his lawful incarceration.[5] Respondents are wrong on both counts.

First, Mr. Kingsley has maintained throughout this litigation that the Fourth Amendment's objective test governs his excessive force claim. Moreover, he has relied on cases applying the Fourth Amendment's objective standard to pretrial detainees' excessive force claims, and cited the courts of appeals' division on that question, Pet. 11–13; see also Kingsley's Pet. For Reh'g En Banc, 6 & n.2, 8, 10. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); see also *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374,

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[5] Respondents (and the United States) also note that this Court has not accepted a continuing seizure theory for pretrial detainees. Br. Resp'ts 53; Br. U.S. 21. Mr. Kingsley never asserted that it had, but simply pointed out that some members of this Court had cited it with approval. *See* Br. Pet'r 29.

378 (1995) (considering an argument "expressly disavowed" below). On this record, Mr. Kingsley may make arguments in support of a Fourth Amendment claim.

Respondents then offer three additional reasons why objectively unreasonable force against a pretrial detainee cannot be deemed an illegal seizure under the Fourth Amendment. First, again relying on *Lewis*, respondents assert that an objective reasonableness test would amount to a negligence standard under the Fourteenth Amendment. Br. Resp'ts 16, 45–46. But for the reasons discussed above, see *supra* pp. 8–9, *Lewis* addresses the distinction between intentional and accidental acts, a question not at issue here given the officers' deliberate actions. Second, they label the theory "novel." Br. Resp'ts 54; see also Br. U.S. 22. Novelty, however, is not a reason to reject a theory that flows inexorably from this Court's cases addressing the meaning of the word "seizure." See Br. Resp'ts 30–31.

Finally, respondents rely on this Court's cases holding that the Fourth Amendment is inapplicable to *cell searches* of lawfully incarcerated persons—both convicted persons (*Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984)) and pretrial detainees (*Bell*, 441 U.S. at 556). Br. Resp'ts 54–55. Those cases do not govern the wholly separate question whether the Fourth Amendment applies to claims that excessive force has been used against a pretrial detainee. In *Bell*, this Court weighed the government's legitimate interests in placing restrictions on pretrial detainees against the individual's interest in *privacy*. 441 U.S. at 544–48, 555–60. Here, the balancing process yields a different outcome: the government's legitimate interests are balanced *not* against the individual's interest in privacy but against his interest in "bodily integrity,"

or freedom from an officer's use of objectively unreasonable force. *Tennessee* v. *Garner*, 471 U.S. 1, 7–8 (1985). Lawful incarceration cannot provide a basis for eliminating a pretrial detainee's undisputed interest in freedom from the use of objectively unreasonable physical force.

Respondents argue that this reading will open the litigation floodgates because prisoners will characterize every restriction on movement as a new seizure. But this Court's balancing test, as described in *Bell* and *Graham*, will weed out claims based on simple restrictions on the movements of lawfully incarcerated persons like they resolve claims based on privacy interests—that is, the government's interests will generally outweigh the prisoners' interests. The outcome of the balancing test differs when the prisoner is a pretrial detainee claiming an objectively unreasonable use of force.

Moreover, respondents' floodgates argument ignores the evident distinction between the routine restrictions of incarceration and the use of excessive force. Just as incarceration is not equivalent to *Miranda* custody (and thus is not inherently coercive), see *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1224–25 (2010), incarceration also is not equivalent to the kind of seizure resulting from the government's use of excessive force. Cf. *Sandin*, 515 U.S. at 484 (conditions of incarceration can violate the Due Process Clause "of [their] own force" or when the State "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

Finally, respondents contend that Mr. Kingsley's argument cannot logically be cabined to pretrial detainees. But there again respondents rely on the incorrect premise that the government must be allowed to treat *all* lawfully incarcerated persons—pretrial

detainees and convicted prisoners—the same way. As noted above, it is a "prisoner's conviction" that "entitles the State to classify him as a 'criminal'" and punish him. *Ingraham*, 430 U.S. at 669. A pretrial detainee has not been convicted of a crime—indeed, may be guilty of nothing more than an inability to make bail. That is an entirely legitimate basis on which to distinguish the standard of proof for his claims of excessive force from the standard governing the analogous claim of a convicted person subject to punishment under the Constitution.

III. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Even had respondents preserved the argument that they are entitled to qualified immunity, which they did not,[6] that argument lacks merit. Notably,

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[6] Respondents failed to preserve their argument for two reasons. First, respondents' objections in the district court, D. Ct. Doc. 28, at 18–22; D. Ct. Doc. 158, at 83–85, and the conclusory footnote in respondents' brief in opposition to certiorari, Br. Opp'n 17 n.1, are insufficient to preserve the issue—particularly because they fail to spell out respondents' newest argument, Br. Resp'ts 56, that *any* clarification of the required mental state would entitle them to qualified immunity. That failure prevented the district judge and jury from making any findings that might be necessary to that determination. Second, respondents failed to cross-appeal, as a party must when seeking to enlarge his own rights under a judgment. *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015). A ruling of qualified immunity provides additional rights to a government official, such as exemption from "the costs of trial" and "the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18; *see also Camreta* v. *Greene*, 131 S. Ct. 2020, 2030 (2011) (describing qualified immunity's presence in "a special category" regarding "review of appeals brought by winners"). A government actor who prevails on the merits thus must cross-appeal a denial of qualified immunity to preserve that claim. *See, e.g.*, *Peterson* v. *Wilson*, 141 F.3d 573,

respondents limit their qualified immunity challenge in this Court to the application of the Fourth Amendment. Br. Resp'ts 55–56 (arguing that qualified immunity would apply "[e]ven if this Court were to adopt a Fourth Amendment objective reasonableness standard").[7] Thus, respondents apparently concede that the officers would not have qualified immunity under *Bell*'s due process standard.

And for good reason. Qualified immunity "generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818–19). But it was clearly established in 2010 that respondents' use of force was objectively unreasonable. This Court explained in *Graham* that the objective reasonableness test turns on "the facts and circumstances of each particular case," including whether the target of the force "poses an immediate threat to the safety of the officers or others, and whether he is actively resisting" the officers. 490 U.S. at 396. Mr. Kingsley denied resisting removal of the handcuffs, and given that he was at the time face-down on a slab concrete bunk, any resistance he showed could not have been of the "active" variety that would insulate the officers' actions. See J.A. 45 (district court observing that, in

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579 n.21 (5th Cir. 1998); *Gulliford* v. *Pierce Cnty.*, 136 F.3d 1345, 1351 (9th Cir. 1998).

[7] To the extent respondents characterize Mr. Kingsley's position as equating the Fourth Amendment and Due Process tests, they are mistaken. Mr. Kingsley distinguished the *Bell* test from the Fourth Amendment analysis, Br. Pet'r 28–29, and made clear that the tests are separate and motivated by different considerations, even if the end result is the same, Br. Pet'r 13. The United States agrees. Br. U.S. 20.

video of the incident, Mr. Kingsley "does not appear to be moving his body around aggressively or very much at all"). Thus, the use of force was objectively unreasonable under then-existing law. See, *e.g.*, *Lewis* v. *Downey*, 581 F.3d 467, 478 (7th Cir. 2009) (unprovoked use of taser violated pretrial detainee's constitutional rights); *Titran* v. *Ackman*, 893 F.2d 145, 148 (7th Cir. 1990) ("If the officers intentionally restrained, jolted, and roughed up [a detainee] without physical provocation from her, their behavior was unreasonable.").

Respondents nevertheless argue that qualified immunity should apply "[i]f this Court adopts an objective reasonableness test" because the Seventh Circuit also required a subjective showing at the time of the incident.[8] Br. Resp'ts 56. But such an application—under either the Fourth or Fourteenth Amendment—would be inconsistent with the purpose of qualified immunity. Qualified immunity protects officers who make a calculated decision to use force; it "'operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Pearson* v. *Callahan*, 129 S. Ct. 808 (2009) (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002)). Respondents would not be entitled to qualified immunity, even if it were not "clearly established" that subjective good faith

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[8] Notably, the Seventh Circuit's pattern jury instructions, which represent a considered effort by a committee of judges, scholars, and practitioners to capture the current state of the law, do *not* incorporate any subjective intent requirement into the excessive-force elements instructions governing pretrial detainees' claims. *See Federal Civil Jury Instructions of the Seventh Circuit* (2009), Pattern Instructions 7.08-7.09, *quoted in* J.A. 326-31 (opinion below) (Hamilton, J., dissenting). Those instructions require a purely objective analysis. *Id.*, *quoted in* J.A. 329 ("[Y]ou must not consider whether Defendant's intentions were good or bad.").

cannot insulate them from a pretrial detainee's excessive force claim. The guards made a calculated decision to use the taser; that decision could not have been in good faith because that kind of force under the circumstances had been clearly established to be objectively unreasonable. Once respondents were "on notice" that their conduct was objectively unreasonable as a matter of law, as it was here, their actions could not have been changed by further "notice" of the role that their mental state would or would not play in a subsequent excessive force analysis. Thus, qualified immunity is inappropriate here.

IV. THE JURY INSTRUCTIONS IMPROPERLY REQUIRED MR. KINGSLEY TO PROVE THE OFFICERS' SUBJECTIVE INTENT.

The Solicitor General correctly interprets *Bell*'s due process standard, Br. U.S. 12–19, 23–28, but approves the jury instructions here, though they include the very subjective intent requirement that he declares erroneous, and though he agrees they should not be used in the future. Br. U.S. 31. The Solicitor General is mistaken in his contention that the instructions were adequate; as given, they permitted the jury to find that the force was objectively unreasonable, and yet still rule for defendants.

The text of the instructions amply demonstrates this incongruity. Subparagraph (2) of the instruction clearly articulates the requisite objective unreasonableness requirement. J.A. 278. Thus, subparagraph (3), although it likewise recites some reasonableness language, must be serving an additional purpose; otherwise it would be redundant of subparagraph (2). *Id.* The additional purpose of (3) is clear from its other language, which requires the plaintiff to prove an additional subjective requirement: that defendants "recklessly disregarded plaintiff's safety." *Id.*; see also

Farmer v. *Brennan*, 511 U.S. 825, 839 (1994) (noting that recklessness often means that "a person must 'consciously disregar[d]' a substantial risk of serious harm" (quoting Model Penal Code § 2.02(2)(c))). That confusion is compounded by the instructions' two other references to recklessness, which similarly described it as an additional requirement separate from objective reasonableness. J.A. 277 ("Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time."); J.A. 278 (asking whether "defendants used unreasonable force and acted with reckless disregard of plaintiff's rights"). As the dissent below explained, J.A. 318–21 (Hamilton, J., dissenting), each of these mentions could have confused the jury; their combined impact could not be harmless.

The instructions' misstatement of the governing law requires reversal because "a reasonable juror could well have been misled by the instruction given." *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979).[9] Review of jury instructions requires "careful attention to the words actually spoken to the jury," *id.* at 514, and "potentially offending words must be considered in the context of the charge as a whole." *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985). Here, the very inclusion of a recklessness requirement in the instructions, as well as the context indicating that that requirement was in addition to an objective showing,

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[9] Relying only on circuit precedent, the Solicitor General cites a different standard. Br. U.S. 28–29 (citing *Westchester Fire Ins. Co.* v. *Gen. Star Indem. Co.*, 183 F.3d 578, 585 (7th Cir. 1999)). This Court need not endorse that standard, which differs from other tests stated by the court of appeals, *see, e.g.*, *Huff* v. *Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007); but the district court's error satisfies the Solicitor General's cited standard as well.

wrongly invited the jury to assess the officers' mental state. Given the difficulty of proving a culpable subjective intent—both in this case and in general—when a defendant disputes that mental state, the legal error in the instructions seriously prejudiced Mr. Kingsley.

CONCLUSION

For the reasons given above, the decision below should be reversed.

Respectfully submitted,

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